

2017

Judicial Perspectives Series

Roger A. Page

Supreme Court of Tennessee - Justice

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JUDICIAL PERSPECTIVES SERIES

FEATURING: JUSTICE ROGER A. PAGE*

*Moderated by Professor Jeffrey Omar Usman***

January 11, 2017

Introduction: Welcome to Belmont Law. My name is Ashleigh Karnell, and I am the editor-in-chief of the Belmont Law Review. Thank you for coming to the Belmont Law Review's 2017 Judicial Perspectives Series Event. Our guest tonight is Justice Roger Page of the Tennessee Supreme Court. Justice Page was sworn in as the newest member of the Tennessee Supreme Court in February of 2016, having been appointed by Governor Bill Haslam and confirmed unanimously by the Tennessee General Assembly. Prior to taking his seat on the Supreme Court, he served as an appellate judge on the Tennessee Court of Criminal Appeals from December 2011 to February 2016. During that time, Justice Page wrote over 330 appellate opinions. From August 1998 to December 2011, he presided over both civil and criminal trials in the 26th Judicial District. Prior to his experience on the bench, Justice Page was an Assistant Attorney General for the state of Tennessee in Jackson from 1991 to 1998. He was also in private practice from 1985 to 1991 and a law clerk for the then United States District Court Judge Julia Gibbons from 1984 to 1985. Justice Page received his law degree with high honors from the University of Memphis. Our moderator this evening is the faculty advisor for the Belmont Law Review, Professor Jeffrey Usman. Without further ado, I will turn it over to him.

Moderator: Justice Page has a few people he wants to introduce to us this evening, so I'll turn it over to him.

* Justice Roger A. Page was sworn in as the newest member of the Tennessee Supreme Court in February 2016 after he was appointed by Governor Bill Haslam and unanimously confirmed by the Tennessee General Assembly. Prior to assuming a seat on the Supreme Court, he served as an appellate judge on the Tennessee Court of Criminal Appeals from December 2011 to February 2016. In 1998, he was elected as a circuit court judge for Tennessee's 26th Judicial District, which includes Chester, Henderson and Madison Counties, and served in that role from August 1998 until December 2011.

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Justice Page: I see a lot of friendly faces in here, but I want to introduce my wife, Chancellor Carol McCoy, who is sitting back there, and my sister, Lisa Reyes, and her husband, Nick Reyes. They were also sitting there at my confirmation hearing so this gives me flashbacks.

Moderator: We are very appreciative that you all are here this evening. Let's start by talking about past experiences and how those inform your performance of your job. Before assuming your position on the Tennessee Supreme Court, you served as a trial court judge. How did the experience of serving as a trial court judge in the State of Tennessee help prepare you for your current job?

Justice Page: I was a trial court judge in the 26th Judicial District, which includes Madison County, Chester County, and Henderson County in West Tennessee. Madison County is almost an urban county, but the other two are very rural. That was a mixed practice because I had general jurisdiction for both criminal and civil issues. With all that variety, I was able to get an introduction to a wide range of cases, which really helps me in my job now. I would sometimes try a medical malpractice case one week and on the following Monday start a murder case. The other way it helped me was in the transition to being a judge. The biggest transition I've had to make in my law career is transitioning from being an attorney to a judge.

Moderator: What about your experience from the Tennessee Court of Criminal Appeals? How did that experience help prepare you for the Tennessee Supreme Court?

Justice Page: I learned to be an appellate judge. The difference between being a trial judge and an appellate judge is like night and day. There wasn't a whole lot of writing as a trial judge in a busy district. Sometimes I wrote a post-conviction opinion or a civil order, things like that, but the Court of Criminal Appeals is a very busy appellate court. I wrote around eighty opinions a year when I was on that court. As an appellate court judge, you learn to look at the record, organize your office, utilize your law clerks, prepare for oral argument, and handle oral arguments. I had already done all that by the time I switched to the Tennessee Supreme Court. Both of those prior experiences have been so beneficial to me in this new job.

Moderator: Justice Page, I believe I'm correct in saying that you're the only Tennessee Supreme Court justice who also has a background in pharmacy. We talked a little about how being a trial court judge and an appellate court judge prepared you, but what about other experiences, such as being a pharmacist in the State of Tennessee? How has that type of work experience and background helped prepare you for your current position?

Justice Page: Well, I mentioned the medical malpractice cases earlier. Lawyers in those cases would think that because I had a pharmacy degree I was an expert. They would say, “Of course, as you know, your honor,” and then mention something about an unfamiliar topic. They would just assume I would know what they were talking about. Every time I had a medical malpractice case, it was like a mini-medical school with medical terms and such. Having a pharmacy background was really helpful in those cases, especially in considering expert witness testimony and things of that nature. Overall, though, just having a professional background and interacting with people has helped a lot.

Moderator: What have you found to be the most significant differences between your experience as an appellate judge for the Court of Criminal Appeals and as an appellate judge for the Tennessee Supreme Court?

Justice Page: When I was on the Court of Criminal Appeals, probably ninety-five percent of my time was spent working on opinions, either drafting them myself or considering what the law clerks had given me. On the Supreme Court, I vastly underestimated the amount of administrative matters that I would have to handle. I now probably spend only about forty percent of my time working on opinions and the rest working on Rule 11 applications or performing administrative tasks. I’m currently a liaison to two commissions, the Board of Professional Responsibility and the Tennessee Lawyers Fund for Client Protection. I spend time with those groups and have meetings in person six times per year with one commission and four times per year with the other commission. Additionally, since I’m the new person on the court and people don’t really know me that much outside of West Tennessee, I’ve been invited to speak in Chattanooga and Knoxville three or four times. I’ve also been asked to speak in Columbia, Nashville, Dyersburg, and Memphis several times. I’ve enjoyed that, but it is time-consuming.

Moderator: You’re the first justice to go through the process of being appointed and confirmed to the Tennessee Supreme Court in the wake of the 2014 amendments to the Tennessee Constitution that affected that process for judges.¹ I wonder if you might share with the audience tonight a little bit of your experience with that process and the new confirmation system.

Justice Page: I have been appointed through an appointment process twice. I went through the process in 2011 to be on the Court of Criminal Appeals before the amendment and then again to be on the Supreme Court after the change. I want to start by talking about the nominating process a little bit.

1. TENN. CONST. amend. 2 (2014).

We have a nominating commission that rotates the order that they question the candidates. One time they go in alphabetical order and the next time they go in reverse alphabetical order. I had been a trial judge for almost fourteen years and I was used to sitting up in the front with everyone looking at me. Then, when I applied for the Court of Criminal Appeals, I went into the Supreme Court building in Jackson and I was sitting there looking up at twelve people. It had been a while since I had done that and it was a little intimidating. The day I was questioned for the Court of Criminal Appeals, they went in reverse alphabetical order. Being a P, I got to go second. Then when I applied for the Supreme Court, they did it in alphabetical order and I was eighth out of nine. That time, I was in a room from eight in the morning until ten after four o'clock listening to the first seven candidates answer questions from the nomination commission. Let me say, those people do a great job. Cheryl Rice was the chair then and they were so nice to us. There were a few gotcha questions, I guess. I know Dean Gonzales served on the commission at some point, but I think I missed him. He came after my first time and was gone before my second. I got up at ten minutes after four during the Supreme Court nominating process, and you would think it would be an advantage to listen to all the other candidates going before you answering the same questions, but it's really not. There are only one or two ways you can answer a lot of the questions so you have to repeat what someone else said or make up something that is different and that might sound stupid.

In the nominating process, I was one of the three names given by the nominating committee to Governor Haslam. The first time I went through it, I had met one of the other two candidates and didn't even know the other one. People don't backstab or do anything like that. It really isn't that type of process at all. Then, when I went through the Supreme Court nominating process, the other two candidates were friends of mine. One was a colleague of mine from the Court of Criminal Appeals from Kingsport, Judge Robert Montgomery, and the other was Judge Thomas "Skip" Frierson from the Court of Appeals with whom I had gone to appellate judge school. It was difficult to go through with really good friends.

The next part of the process was an interview with Governor Haslam. I like to tell stories so I'm going to tell one. Our governor, regardless of your political philosophy, is one of the nicest gentlemen you will ever meet. I had interviewed with him before but when you go in his office, the first thirty minutes you interview with the governor's legal counsel. The first time I went through the process that was Mr. Herbert Slatery, who is now our Attorney General. The second time, it was Mr. Dwight Tarwater, who is still in that position. So after you talk to the legal counsel for thirty minutes, you are ushered into the governor's office and,

of course, everyone is a little nervous. The first time I went in and sat down and Governor Haslam came from behind his desk, sat down in a chair, and just talked to me. He isn't a lawyer, but he interviews all three candidates for each judgeship. He then makes a decision for each position after consultation with the lawyers who work for him. It's very impressive. I'm not sure that any governor, at least in my opinion, puts as much time into the decisions as he does.

Before I went to the interview, I was told that Governor Haslam was always very serious and never laughs during the interview process. A friend of mine challenged me to try and make the governor laugh, so I went in thinking, "I'll accept that challenge." When I went in and sat down I said, "I'm a little nervous, Governor. This kind of reminds me of a case I had in Henderson County a few years ago as a trial judge." Then I told him the story. This gentleman came into court and I was taking his plea for a DUI. One of the questions we ask before accepting a plea is whether the defendant is under the influence of alcohol or drugs or anything that might impair his judgment. Court had started at about 8:30 and this was about ten 'til nine. We would usually take about ten or twelve pleas in a row before we moved on to the civil motions. When I asked him if he was under the influence, he answered the question with yes. I was almost to the next question and just stopped. I said, "You answered yes?" He said, "Yes, sir." So, I asked him what he had used and he told me marijuana. I said, "When did you smoke marijuana?" I knew I was in trouble when he looked at his watch. Then he told me he had smoked about twenty minutes ago. I was wearing my robe so I stood up and said, "You mean you disrespected this court by smoking marijuana immediately before you came in here?" He looked up at me and said, "Sir, you make me nervous." After I finished the story, I looked at the governor and said, "I am not under the influence of any substance, but sir, you make me nervous," and he laughed.

A couple days ago was the anniversary of the day when the governor called me and told me that I had been selected. That day, Rob, Skip, and I were trying to ascertain exactly when the call was going to come because we knew the legislature was starting back. We decided it had to be January 7th because that was the last day before the legislature came back and we still hadn't heard anything. I knew that they had to have a press release out by a certain time of day, so I had decided that if I hadn't gotten a call by ten o'clock, I wasn't going to get the position. I was trying to work but it was impossible. The phone rang at 9:53 a.m. I looked at it and saw that it was Mr. Tarwater's number. When I saw the phone number, I just knew I didn't get the position because the governor usually calls the successful applicant and the legal counsel calls the other two applicants. I thought whichever of the other two other guys got it would do a fine job. I answered the phone and heard, "Good morning, Judge Page. This is Bill

Haslam.” So I thought, “Oh, this is different.” The other time he called me, when he offered me the job on the Court of Criminal Appeals, he immediately asked me if I wanted the position. This time we had been talking for two or three minutes, the first of which I thought I had been selected, but then he kept talking and asking me how my grandkids were doing and other things. Then I thought, “Maybe he’s such a nice man that he’s just calling everybody.” Finally, he asked if I still wanted to be on the Supreme Court and offered me the job. We talked a minute and I assured him that I wanted it, so he told me I could call my wife, but told me not to tell anyone else before the press release went out at noon. I said, “Governor, I assure you I will not tell anybody.” When he called me, I had been walking the rectangle on the second floor of the Jackson Supreme Court Building and I stepped into the library up there since there was nobody in there. So when I finally hung up and took a big breath to walk out of the room, there were about ten people out in the hallway. Apparently one of the other judge’s law clerks had heard me say, “Hello, Governor,” when I answered the phone. I took them all down to the conference room and made them swear to secrecy.

A few weeks later we began the confirmation process. This was the first time the confirmation process had ever been done since the new provision passed in November 2014 that required appellate court judges to be appointed by the governor and confirmed by the legislature. When I got the call on January 7th that I would be appointed, there was no process in place for confirmation and most of my friends were just calling me a guinea pig. The waiting game went on about a month, maybe a month and a half, before the legislation passed that directed how I was to be approved by the House and the Senate. In Tennessee, we have a Senate Judiciary Committee and then in the House we have a Civil Justice Committee and a Criminal Justice Committee, so at one point I thought that I was going to have to go before three committees. House Speaker Beth Harwell helped combine those two House committees to make things easier. I’m old enough to remember the Robert Bork and Clarence Thomas confirmations, so one of the things I did to prepare for the confirmation hearing was to watch all of the videotapes of Justice John Roberts, who did the best of anyone I had ever seen. After it was all over with, they gave me a videotape of the proceedings and I’ll look at it someday, but not anytime soon. It really wasn’t that bad. I was in the House Committee for about an hour and the Senate Committee about an hour and a half. Most of the questions I was able to anticipate. One little wrinkle going into it, though, was that about a week before I went in there, Justice Scalia had died. I knew I would get a lot of questions about him. After the hearings were over, the committees voted unanimously on February 17th to send my name to the full House and Senate. On February 22nd, the entire House and Senate voted in joint session and I was confirmed unanimously.

Moderator: Let's talk a little about your judicial philosophy in terms of how you think about the law. What makes a judge a good justice and what makes someone not a good justice? What are those qualities and attributes?

Justice Page: You have to be able to work well with others. You have to be professional and respectful of lawyers and your colleagues. When I was a trial judge and would be asked to speak, they would ask me what makes a good judge. I would always say integrity, work ethic, intelligence, and a good temperament. Some of those same qualities also roll over into the appellate courtroom. You have to have self-confidence but also be able to listen. One big difference is that you need good writing skills in the appellate court; some trial judges are not required to write very much. The other thing I've learned is that you can't worry about criticism. Don't look to see what people are tweeting about you because some of it won't be good. I've been accused of being liberal. I've been accused of being conservative. You just have to let it go.

Moderator: Are there any appellate justices that stand out to you as models? People that you look to emulate their approach or use as judicial models?

Justice Page: That question is easy for me: Judge Julia Smith Gibbons. We started working together in 1984. I was in her second group of law clerks, and I learned how to be a judge from her. Being a United States District Court judge is a hard job. She had also been a state circuit court judge for a couple of years. While I was there, on few occasions, she sat by designation on the United States Court of Appeals for the Sixth Circuit. On those cases, we were treated just like appellate law clerks. I went to Cincinnati twice and sat with the other appellate law clerks. Just watching her and the way she treated the lawyers was incredible. I never saw her disrespect anybody. One of things I did when I was a trial judge when I would walk into a courtroom, and I still do it now, was to remind myself, "There is someone in here who will never see me as a judge again." If I mistreat someone, that's the only impression that person or spectator would ever have of me. They would never see me again to let me change that perception as a judge. I watched Judge Gibbons sentence people, which is a hard thing. If it's not, you need another job. She would be my role model along with a few others.

I also admire Justice Adolpho Birch. When I had been a trial judge for three or four years, he called me and asked if I would be on an appellate panel for workers' compensation cases. Those special panels would always have one or two trial judges on them. When Justice Birch asked you to do something, you did it. I went and sat on this panel and one of the things I saw was a lawyer who argued in court and said, "This is from Chancellor

so-and-so and he always makes mistakes like this.” Justice Birch came out of this chair and made it very clear to the gentleman that he should never disparage a trial judge like that again. I appreciated that as a trial judge.

Moderator: One of the on-going discussions being had within the Supreme Court of the United States over the last few decades is over the role of legislative history in terms of statutory interpretation. Justice Scalia, who you mentioned earlier, is one of the strongest opponents of relying on legislative history in determining statutory meaning, while Justice Breyer has been one of the most ardent defenders of using legislative history.² What do you see as the role of legislative history when you’re sitting down trying to determine the meaning of a statutory provision passed by the Tennessee General Assembly?

Justice Page: The first thing in interpreting statutes is to look at the plain language of the statute and if it answers the question then that’s where you stop. As far as Justice Scalia’s philosophy, one of the questions I was asked during confirmation was how I felt about him as a justice. I disagreed with a few things he did. Particularly, I disagree with how Justice Scalia would say negative things about his colleagues. The other thing I disagree with him about is legislative history. I don’t know that I would go as far as Justice Breyer, but I think I would put myself somewhere in middle. I do think it is important, though. We look at it all the time and consider it.

Moderator: One of the other emerging conflicts over interpretation is over the role of constitutional avoidance principles, where courts avoid the constitutional question by interpreting the statute in such a way as to avoid that conflict. A lot of people think courts have gotten too aggressive in their use of constitutional avoidance. How do you draw a line between avoiding an unnecessary constitutional question and over-aggressively reading a statute?

Justice Page: I’m struggling with that in one of my opinions right now. I lean more towards the constitutional avoidance side. If you don’t need to decide the constitutional issue in order to decide the case, then I don’t think you should.

Moderator: Let’s talk about policy arguments. If there is a lawyer trying to argue for an interpretation of a statute, how much do you want to see that lawyer arguing about public policy implications?

2. See generally, Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161 (1996); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205 (2000).

Justice Page: It depends on the case. Anytime there is something that will help me to make the decision, I'm willing to listen to it. Public policy is very important. In some cases, it can be more important than others, but I don't think you look at it past the issues in the case.

Moderator: Another area of controversy is stare decisis. Justice Clarence Thomas has taken the view that the Court, in constitutional interpretation cases, is placing much too strong of a focus on stare decisis and should be more willing to rethink constitutional interpretation.³ Do you lean in the Justice Thomas direction or believe that stare decisis should play a more prominent role in interpreting the Constitution than he would suggest?

Justice Page: It should play a significant role in constitutional interpretation. I come down on the side of thinking that if it's a particular case or ruling where it is obvious that the precedent is wrong, you need to change it. One of the examples I gave in my confirmation process when I was asked basically that same question was *Plessy v. Ferguson*.⁴ That case, which was clearly wrong, was the law for years until *Brown v. Board of Education*.⁵ There are always going to be instances in which we should change. One of the justices, I think it was Justice Brandeis, said it was better to have the law settled than to have it settled right.⁶ I vehemently disagree with that. If you find out something is unworkable, then it needs to be changed. However, stare decisis is very important and you have to be very careful in overruling things just because the makeup of the court has changed.

Moderator: If the lawyers are arguing in briefs and sometimes orally before the Tennessee Supreme Court for an evolution of change in the Tennessee common law, what types of arguments do you want to see? Fifty state surveys, evidence that other states are moving this way, psychological studies? What types of arguments should the attorney be making?

Justice Page: Fifty state surveys are very important, especially if you have similar common law in other states. We talk about this in deliberation sometimes, but Tennessee is one of the three or four states that are still outliers on certain areas of the law, so maybe it's time to change. Because of that, fifty state surveys are very important. As far as having scientific evidence and such, as long as it's litigated in the trial court and the lawyers

3. See KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* 281-82 (2005); *McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3058-88 (2010) (Thomas, J., concurring).

4. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

5. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

6. *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) (observing that generally "it is more important that the applicable rule of law be settled than it be settled right").

have a chance to look at things like DNA evidence, those would be circumstances where that would be helpful.

Moderator: Over the last decade, there have been a number of separation of powers issues that have arisen with legislative changes in the State of Tennessee. In other words, situations where the General Assembly has passed some legislation that may cause problems in terms of separation of powers in Tennessee. How do you create a good relationship with the legislature and trying to avoid these separation of powers problems from arising on the front end?

Justice Page: That is a good question. Some people think we shouldn't have a relationship with the legislature and I disagree with that. I have many legislators' numbers in my cell phone, and I'm sure my number is also in their phones. But I won't meddle in their business because that's not the job of the Supreme Court. We also have lawyers in the Administrative Office of the Courts who work with the legislature. If there is a bill that may have a problem, I don't see a problem with contacting that person, maybe the sponsor, and just talking about it to maybe head off the problem.

Moderator: How do you build that relationship and confidence with members of the legislature?

Justice Page: Some of the people in my cell phone I've known for a long time. Some of them I knew even before I was a judge. You build relationships like that. It's also important to do your best to meet people. I met all 132 legislators just last January, but it's different to just sit down and talk to somebody. I enjoy meeting people and I don't mind them calling me and asking me questions. I tell them that if they call me to talk about something and I can't ethically talk about it, I'll just tell them that.

Moderator: You mentioned one of the attributes of a successful judge is being able to work with colleagues. When it comes to separate opinions, when is it the right time to write a concurring opinion? No opinion written by someone else is going to be written exactly the way you would have written it. When should you simply concur?

Justice Page: I've only been on this court for ten months, so I haven't written a separate opinion yet. I have four majority opinions that have actually all been unanimous so far, although there are some in the pipeline that will most likely not be unanimous. In the Court of Criminal Appeals, I know of at least one occasion when there was a case and all three of us sat there in deliberation and said, "Let's draw straws and see who is writing the dissent, because we know this needs to go to the Supreme Court." As far as writing concurring or dissenting opinions on the Supreme Court, I'm not

going to write one unless it's the right issue. They say to pick your battles. On the Court of Criminal Appeals, you were trying to get the Supreme Court to look at it. Here at the Supreme Court level, you're saying you disagree with something or agree but for different reasons. If you think the majority opinion doesn't arrive at the correct outcome, then you should write separately.

In my experience on the Court of Criminal Appeals, I would write a dissent and the authoring judge would receive it and either say that I was right or was willing to change the opinion to go along with it. It kept happening where I would work so hard on this dissent and it would never see the light of day. I don't know if I'll have that same experience on the Supreme Court or not. I will say that it is very different being on a five-person court versus a three-person court. Everybody on this court, maybe myself excluded, is really intelligent, very articulate, and asks a lot of questions. We had oral arguments in Knoxville yesterday and three or four times I thought of a great question and before I could get it out, someone else would ask it. One thing I would tell new judges is not to ask a question just because you feel pressured to ask a question.

Moderator: How is the collaborative process different between the Court of Criminal Appeals and the Supreme Court?

Justice Page: I hope I'm not divulging any secrets here, but it's very different. On the Court of Criminal Appeals, right when I was leaving, we were just beginning electronic distribution. Before that, Judge Number One, the author, mailed the draft opinion to Judge Number Two, who would say yes or no and send it to Judge Number Three. That took far too long. We would pick up the phone sometimes and talk to each other. On the Supreme Court, we have a lot more discussion. On the Court of Criminal Appeals, we would discuss each case after we heard oral arguments and whoever was going to write the case would go first. We would draw numbers, and let's say there were twenty-seven cases on the docket, the presiding judge would number one, two, three all the way down and then draw numbers to see who had which cases.

I will say that there is a lot more reading and paper at this level. I have my iPad and am trying to get away from the paper, but the first time I came to Nashville and tried to use the iPad it wouldn't work and I had to take a break and go get the paper. We study everything in advance, read all the briefs, and now we have the ability to look at the record online, which we've only been able to do for the last couple of years. We're not assigned cases until the Chief Justice makes the assignments after oral arguments. By the time we sit down to write, we know what everyone is thinking about the case. Sometimes everyone agrees, sometimes it's four-one, and sometimes

three-two. I know one case where we changed our minds after we got back to the office and thought about it. I was told early on that one of the strategies is that if you see an opinion and you really don't agree with it, then you better hurry and get your disagreement out there for everyone to see. Otherwise, everyone else will say they agree and it ends up four-to-one and you haven't said anything. It's just a lot different.

Moderator: You mentioned that you diverge from Justice Scalia's approach with regard to how he addresses his colleagues in dissenting opinions. What's your perspective on dissenting? What is the appropriate tone?

Justice Page: The tone should be collegial. I would never write a dissenting opinion that just went through and rebutted the majority opinion point by point. You pick out the one point that you really disagree with and point that out. As I said earlier, I haven't written one yet at this level, so that might change once I get in there and start doing it. Dissents should remain collegial. I hope that I would never write a dissenting opinion in which I sound personally upset with a colleague.

Moderator: You also mentioned part of the difference in the transition between the Court of Criminal Appeals and the Supreme Court was the number of administrative tasks. When you're considering an attorney for one of those board positions, what are the attributes and qualities that you consider for those positions?

Justice Page: You want somebody that you know is going to be competent and serve with integrity. I'm looking for someone who is active in the bar associations, like the Tennessee Bar Association and maybe local bars. Someone I think will do a good job. It's basically like any other job interview. I've gone through that on two different boards. We go through those who have their terms expiring in December. Some of those folks who have their terms expiring are in East Tennessee, so I don't know them. In those situations I'll call a colleague and ask who they would recommend for the position.

Moderator: Looking out, I see a number of recent graduates who are current law clerks and a number of students who are aspiring law clerks. What makes a good law clerk?

Justice Page: All the attributes that make a person a good judge also apply to law clerks. In addition, clerks must be good writers, collegial, have self-confidence, and really put in some long hours sometimes. Obviously being a law clerk isn't like being a first or second year associate at a firm, but

there are still times where extra hours are needed. I want someone who will challenge me some and someone who doesn't mind being challenged.

Moderator: In 2009, the Tennessee Supreme Court made the Access to Justice Initiative its number one priority.⁷ What is Tennessee doing well with Access to Justice and where are we struggling?

Justice Page: I would be remiss if I didn't mention former Chief Justice Janice Holder. In her tenure in office, she, along with Margaret Behm and Buck Lewis, did a great job. From the statistics that I have seen, what we are doing well each year is increasing the number of pro bono hours that lawyers are putting in. Everyone is doing a great job. I don't know what exactly we aren't doing well, but I would encourage everyone to participate in pro bono work. I still remember a pro bono case I took and I was able to help a lady get her house back after she had lost it.

Moderator: When Chief Justice Holder was here, I asked her this same question: Do you support mandatory pro bono hours? Her response was no. Do you have a sense of your opinion on that issue?

Justice Page: I don't think it should be mandatory. I would hope we could inspire people to actively take pro bono hours. I've been amazed at how lawyers have responded to different tragedies, such as the Gatlinburg fire. I have to say, there are a lot of bad lawyer jokes, but lawyers are very helpful folks. One thing that always bothered me is that we might have one lawyer out of hundreds who commits a wrong and that is the person in the newspapers and on Twitter getting attention when 99.9% of lawyers are doing good things.

Moderator: In terms of professionalism, you're the liaison to the Board of Professional Responsibility. What would you like to see as a priority for the Board?

Justice Page: Consistency is one thing. This has been a life-changing experience for me. As the Board liaison, there are some things that I see that just surprise me. I see so many proposed discipline orders come across my desk—several per week—and it's just tragic to look at those situations. So many times, we see a lawyer who has been practicing for fifteen or twenty years with no problems and then suddenly—it's not stealing money from clients—but it's not showing up for court, not returning phone calls, or not diligently representing people. It's almost always an addiction or depression problem. It really breaks my heart to see that.

7. See *Access to Justice*, TNCOURT.GOV, <http://www.tsc.state.tn.us/programs/access-justice> (last visited Mar. 19, 2016).

The Tennessee Lawyers Assistance Program (“TLAP”) is a great help for that. One of my good friends, Judge John Everett Williams from West Tennessee, has been the chair of the program for years. If we can get someone who needs help over to TLAP and straightened out, that can be significant. I have observed two lawyers I know in the last ten years, one of which was the only one I’ve ever told that if he didn’t report himself, I was going to report him. One of them died about six months ago and never could get away from it. The other is going around the state speaking and has been sober for about ten years now and is just doing a great job. Judge Williams does a tremendous job with that. Because he’s been working for TLAP, people assume that he must have had a problem at some point, but he never has. I’ve known him since high school. One of his law clerks took his own life and a court staff attorney also took her own life. She was a mother with young children and that just broke his heart, so he started working with TLAP. Depression is rampant in society and even more so with lawyers.

Moderator: In terms of professionalism, trial court discovery gets most of the attention for lack of professional conduct. As a former trial court judge and now as an appellate judge, is there anything you don’t want to continue to see from lawyers in terms of unprofessional conduct?

Justice Page: I mentioned earlier what Justice Birch did when an attorney disparaged a judge. I don’t want to see lawyers disparage trial judges or opposing counsel. Also, it’s okay to say “I don’t know” but you should know that record back and forth at oral arguments. One of the things I hear lawyers say all the time at oral arguments is, “Well I wasn’t the trial attorney, so I don’t know the answer to that.” If you’re going to take that case to the appellate court, you had better know the record and I don’t want to hear you saying you weren’t there at trial.

Moderator: I would be remiss if I didn’t ask for a few practice pointers for the attorneys who are here. Let’s start with the Tennessee Rule of Appellate Procedure 11. In determining whether to grant permission to appeal, the following—while neither controlling nor fully measuring the court’s discretion—indicate the character of reasons that will be considered: the need to secure uniformity of decision, the need to secure settlement of important questions of law, the need to secure settlement of questions of public interest, and the need for the exercise of the Supreme Court’s supervisory authority.⁸ How much of a Rule 11 application that is being filed before the Tennessee Supreme Court should be focused on these factors? What makes for a good Rule 11 application?

8. Tenn. R. App. Proc. 11.

Justice Page: You have to address the factors. While there is discretion, if your case doesn't fall into one of those categories, we probably aren't going to take it. Attorneys should make some public policy arguments for why we should take it. We are not an error correction court. Don't tell us the court of appeals made an error. After being here for ten months, there are times when I read applications and look at my colleagues and say, "I know you're still training me, but this looks like an error correction to me."

Moderator: What are some common mistakes you see while reading briefs from attorneys before the Tennessee Supreme Court that lawyers should try to avoid?

Justice Page: My first comment is that they call them briefs for a reason. We see so many briefs that are so repetitive. We also see lawyers use the facts section to start arguing. Sometimes I'll read a brief where a lawyer has discussed some case that cites another case for a proposition that it doesn't actually stand for and they never truly checked to make sure it supported that proposition. Whether you are before the trial court or an appellate court, your reputation matters and you should be very careful in making statements that aren't really true. Once you lose that credibility, it's hard to get it back.

Moderator: What are some attributes of some really great briefs?

Justice Page: Great briefs are clear and well-organized. Another common mistake that I see lawyers make is trying to avoid a weakness in their argument. You need to address it. If I see a weakness and you don't even address it, that's disappointing.

Moderator: In terms of an appellate court, how important is oral argument to deciding a case?

Justice Page: It matters a lot. Maybe I'm biased because I enjoy it so much. I used to go to court every day and now I am only in court fifteen or twenty times a year. I enjoy oral argument very much and I think it's important. I remember when I was doing oral arguments sometimes I would walk up to the podium and start getting peppered with questions. But the most nervous I got was when I was fifteen minutes in and I still hadn't been asked a question. In those situations, you know their minds are already made up but you don't know which way. I know there have been at least two cases since I've been on the Supreme Court that changed the way I thought about the case based on the oral arguments. My philosophy is that I try to give a lawyer about five minutes to talk before asking questions because you get thirty minutes in front of the Supreme Court. I like to give

the lawyers a little time to speak. I do think oral argument is important though.

Moderator: What should a lawyer be saying in those first five minutes?

Justice Page: Number one: don't try to argue all the issues. It's perfectly okay in an oral argument to focus on two or three issues rather than the eight or nine that have been raised. Don't assume that because a justice asked a question a certain way that they are either on your side or against you. A lot of times we ask questions to try to persuade another justice. Questions are really important. They are an opportunity for you to respond to that judge or justice and get your point across because you know they are interested if they are asking questions. Sometimes I think appellate practitioners do a poor job of responding to the questions asked. It's almost like people who are running for office who go in with the idea that they are going to say "X" regardless of what they are being asked.

Moderator: You have a mixture in the room of experienced attorneys, new attorneys, and aspiring attorneys. What broad-spectrum advice do you have for the audience as a leader of our profession?

Justice Page: For law students, it is very important to have integrity in law school. Don't plagiarize things or do things you shouldn't do. Treat your colleagues with respect because in a few years you will be working with them in cases or against them in cases. In twenty years, you might want to be a judge and down the road when you're applying, one of those classmates might be on the nominating commission. So, if you're a jerk in law school it can come back to haunt you. It is important to never lose your credibility. Being a zealous advocate does not include aggression toward the other lawyer. Sometimes you'll have a client who wants you to be aggressive, especially in domestic cases. Your client won't like you if you aren't aggressive and don't mistreat the other side. I always try to avoid those clients on the front end, but on the back end, you just have to try to change the conduct and attitude.

Moderator: The quality of justice in any state depends in large part in the character, judgment, and integrity of the men and women who serve on that state's judiciary. The people of Tennessee are very fortunate to have Justice Page on the Tennessee Supreme Court. He has been very generous in sharing his time with us this evening but, even more importantly, he has served the people of Tennessee with tremendous dedication as a trial court judge, as a Court of Criminal Appeals judge, and now as a Tennessee Supreme Court justice. Please join me in thanking Justice Page for his time this evening and for his service to the people of Tennessee.